92-622

Supreme Court, U.S.
FILED
NOV 2 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1992

ROBINS ISLAND PRESERVATION FUND, INC.,
Petitioner,

against

SOUTHOLD DEVELOPMENT CORPORATION,
Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the draftsmen of the Treaty of Peace of 1783 and the Jay Treaty of 1794, both British and American, intend that rights under those treaties which accured during the American Revolution, would exist in perpetuity?

2. Did the lower courts properly borrow the New York State Statute of Limitations in dismissing the action, thereby preventing the destabilization of real property titles throughout Long Island?

3. Did the lower courts properly apply a doctrine of laches and statute of limitations to bar an action which accrued in 1785?

PRELIMINARY STATEMENT

For the reasons set forth below, the peition for a writ of certiorari should be denied.

STATEMENT OF CASE

The facts are set forth with particularity in the opinion of the United States Court of Appeals for the Second Circuit, which is reported as 959 F.2d 409 (2nd Circuit 1992), and in the opinion of the United States District Court (Wexler, J.), which is reported at 755 F.Supp. 1185 (EDNY 1991).

POINT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE DOES NOT INVOLVE AN "IMPORTANT QUESTION OF FEDERAL LAW"

Rule 10 of the Rules of this Court set forth the considerations governing review on a writ of certiorari. While Rule 10.1 states that the character of reasons set forth therein are "neither controlling nor fully measuring the court's discretion", none of the character of reasons has been met by the petitioner. This peition does not bring up for review conflicts among the circuits nor does petitioner argue that the decision of the Second Circuit "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower supervision" [10.1(a)], or that the decision of the Second Circuit "decided an important question of Federal law

which has not been, but should be, settled by this Court, or has decided a Federal question in a way that conflicts with applicable decisions of this Court: [10.1(c)].

Each and every argument advanced by the petitioner in its petition to this Court was made to the lower courts, and the lower court, in rejecting peititioner's arguments, expressly found, *inter alia*, that application of a statute of limitations and application of the doctrine of laches neither conflicted with applicable decisions of this Court, nor departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court so as to call for an exercise of this Court's power of supervision.

Respondent, therefore, adopts and incorporates by reference as and for its arguments in opposition to the petition the opinions of the Court of Appeals and the District Court.

The Petitioner ignores the deleterious effect a reversal would have upon titles throughout Long Island and the City of New York.

Title to Robins Island, as well as the entire Long Island, inclusive of the counties of Kings and Queens (the Boroughs of Brooklyn and Queens, respectively), and the Borough of Manhattan in the City of New York, which were under British occupation during the Revolutionary War, have remained stable for over 205 years. The petitioner's action destabilizes the action to all the land which was formerly owned by Parker Wickham and would also destabilize the titles of those lands formerly owned by persons who were similarly attainted under the 1779 Act of Attainder at a time when all of Long Island and the Borough of Manhattan were under British occupation.

One must recognize the ulterior purposes of the petitioner. The Petitioner does not seek to redress a wrong perpetrated 200 years ago to itself or to its ancestor. The

petitioner is a corporation whose stated purpose, as the Second Circuit recgnized, is the "preservation of Robins Island in its natural state" [Pet. App. 2]. Perhaps preservation is a laudable goal. However, petitioner should not manufacture claims under the guise of "redressing ancient wrongs" to frustrate the respondent from lawfully enjoying and developing its property. Where preservation for the public good is called for, there exists adequate means to achieve that objective with greater certainty.

We regard with great skepticism the petitioner's argument that the draftsmen of the treaty, both British and American, intended that claims which accrued during the Revolutionary War should exist in perpetuity. We submit that the logic of the treaties was to enable the claims of British subjects and their heirs to be adjudicated, and confiscated properties restored provided that the British subjects and their heirs acted diligently.

This lawsuit defies that logic. Petitioner is a United States corporation organized under the laws of the State of Delaware [complaint; cr. 1]. Petitioner claims to be the successor in interest to some of the heirs of Parker Wickham and/or Joseph Parker Wickham by virtue of the fact that some of the heirs of Parker Wickham and/or Joseph Parker Wickham purportedly delivered quitclaim deeds to the petitioner [see Exhibit H to defendant's notice of motion for summary judgment; cr 26]. Appellee is a corporation organized under the laws of the State of New York. Thus, the current posture of this case is that an American plaintiff seeks to secure its rights under various treaties designed to protect British subjects, primarily loyalists, and specifically seeks to divest an American defendant of title to real property which is situated within the boundaries of the United States of America.

While we adopt the sound reasonings of the lower courts, we respectfully point out certain matters not

addressed by the petitioner to this court.

Firstly, the need to apply statutes of limitation is essential in the area of real estate litigation because of the need to insure the stability of titles. In *Lewis v. Marshall*, 5 U.S. 470 (1831), this Court stated:

> "The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of title to real estate. Labor is paralyzed where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals."

Moreover, while respondent recognizes that the courts are reluctant to delve into areas of foreign policy, especially when those foreign policy considerations involve the application of treaty rights, we submit that this case will have no effect upon this country's foreign relations. This case involves an American plaintiff suing an American defendant to determine rights to real property located exclusively within the United States. What possible interest would the government of Great Britain have in this case?

Petitioner failed to advise this Court that the United States Department of State, the department of the Executive Branch charged with responsibility for treaty enforcement, has concluded that Article 5 of the Treaty of Peace and Article 9 of the Jay Treaty are no longer in force.

The State Department publishes an annual list of treaties in force. Our survey of that annual publication from 1941 through 1990 reveals that the State Department considers that all of the articles of the Treaty of Peace, with the exception of Article 1 (the article which recognized this

country's independence from Great Britain) are no longer in effect. The state Department also concluded that Article 9 of the Jay Treaty had also lapsed. (See, for example, Department of State publication 9433, Treaties in Force, A List of Treaties and Other International Agreements of the United States In Force on January 1, 1988, discussing the Treaty of Peace, in which it is stated "only Article 1 is in force").

Commentators have also asserted that the various articles of the Treaty of Peace, with the exception of Article 1, have expired. See 12 Bevans, Treaties and Other International Agreements of the United States of America, 1776-1949 (Department of State publication number 8761, 1974), p. 8, which states that Articles 4 through 7 and 10 of the Treaty of Peace "expired upon fulfillment of their terms".

The meaning attributed to treaty provisions by the government agency charged with its enforcement is entitled to great weight by the court. *United States v. Stuart*, 489 U.S. 353, 369 (1989). Thus, the court ought to conclude that rights under the treaties have long since expired.

Finally, petitioner also devotes extensive analysis of this court's decision in *Carver v. Jackson*, 29 U.S. (4 Pet.) 1 (1830) [petition, p. 36, et seq], in support of the proposition that the application of statutes of limitations violate the Treaty of Peace and the Jay Treaty. Petitioner's analysis of the case is erroneous.

The report of the *Carver* case indicates that the plaintiff, Astor, was the grantee of the Morris children who had a vested remainder interest in the property (as opposed to an estate in tail) which predated the 1779 attainder of their parents. The Morris children were not attainted and their estate, according to the Court, 29 U.S. at 50, was not affected by the attainder of their parents. The children's right of possession, however, did not ripen until the death

of their mother in 1825. 20 U.S. at 55. The case was an ejectment action and clearly Astor's cause of action for ejectment did not accrue until his right of possession ripened upon the death of Mary Morris in 1825. In 1828, some three years after his cause of action accrued, Astor commenced his action in ejectment, which was well within the time period for the commencement of an ejectment action under New York law at that time.

The *Carver* case does not hold, as plaintiff argues, that the 1779 attainder of Roger Morris and Mary Morris was ineffective. The *Carver* case is limited to the holding that a statute requiring persons seeking to recover possession of confiscated lands must first pay for improvements made thereto, violated Article 5 of the Treaty of Peace of 1783. The case clearly does not hold that the 1779 attainder and the 1784 sale violates that treaty.

Our support for this proposition is found at page 92 of this Court's decision in *Carver v. Jackson*, in which the court stated:

> "This view of the settlement deed renders it wholly unnecessary to enter upon any minute consideration of the nature and operation of the Attainder Act of 1779; since it is clear, that the Act, whether it were a transfer or destruction of the life estate of the parents (and in our opinion, the former was its true operation), did not displace the vested remainder of the children, but left it to take effect, upon the regular determination of the life estate." 29 U.S. at 92.

Thus, *Carver v. Jackson* was simply a classic matter involving application of common law principles of real property to determine fee ownership.

Petitioner does not challenge that respondent and its

predecessors in title have paid the taxes and maintained the property for more than 200 years. The plaintiff does not deny that neither it nor its predecessors in interest commenced any action or even raised any claim with the State of New York in that entire time.

As the Second Circuit stated in the last paragraph of its decision:

> "Reason tells us that a claim to property long unprosecuted is lost. Whatever else we can surmise from the historical record, it is clear that even if Joseph Parker Wickham had a right to title in Robins Island, he and his heirs slept on this right for over 200 years. If the price of liberty is eternal vigilance, then it is little to ask that the price of property be a small portion of same." [App. 37]

See, also, *McGregor v. Comstock*, 17 N.Y. 162, 165 (1858).

CONCLUSION

For the forgoing reasons, respondent respectfully requests that the court deny the petition in its entirety.

Respectfully submitted,

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